**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 19 April 2007**

Case No. 2005-BLA-5867

In the Matter of:
L.C.[1]
Claimant,

v.

TROJAN MINING,
Employer,
and
TRAVELERS INSURANCE CO.,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
James D. Holliday, Esq.
On behalf of Claimant

John Logan Griffith, Esq.
On behalf of Employer

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

## DECISION AND ORDER – DENIAL OF BENEFITS

[1] Effective August 1, 1006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Further, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On May 12, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 49).[3] A formal hearing on this matter was conducted on July 26, 2006 in Hazard, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross-examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

## ISSUES

The issues in this case are:

1. Whether the Claimant has established the existence of pneumoconiosis;

2. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether the Claimant is totally disabled;

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I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, "ALJX" refers to the Administrative Law Judge Exhibits, and "Tr." refers to the official transcript of this proceeding.

4. Whether the Claimant's disability is due to pneumoconiosis; and

5. Whether the Claimant has established a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial pursuant to § 725.310.

(DX 49; ALJX 2).[4]

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

L.C. ("Claimant") was born on December 11, 1943; he was sixty-two years old at the time of the hearing. (DX 3; Tr. 19). He completed the twelfth grade. He married M.H. in 1973, but they officially divorced in 1996-1997. (DX 3). He has two children, R.J. who was born on November 11, 1996, and L.J. who was born on December 1, 2000. (DX 3).

Claimant stated that he last worked in the coal mines in May of 1992. (DX 3; Tr. 23). He was laid off when the mine was shut down. (DX 3; Tr. 23). He then began working for Kentucky West Virginia Gas Company as a laborer in 1993, and continued to work there until 2000.[5] (Tr. 21-22). He received two injuries while working for Kentucky West Virginia Gas Company. The first was a right knee injury which required surgery and kept him off work for about five months. (Tr. 32-33). The second injury was to his left knee, which also required surgery. (Tr. 33). After injuring the right knee, Claimant ceased working at Kentucky West Virginia Gas Company and has not worked since. (Tr. 33).

Claimant spent approximately six and a half years working underground and thirteen years on the surface of the coal mines. (Tr. 20). Besides his other injuries, Claimant believes that if his pulmonary condition were his only impairment, it still would prevent him from returning to his former coal mine employment as a repairman. (Tr. 20). He currently sees Dr. Mitchell Wicker, whom he has been seeing for more than eighteen years. Claimant sees Dr. Wicker around once a month for arthritis, back, and leg pain management. (Tr. 21).

Claimant testified that at the time of the hearing, he had been smoking "off an on" for over fifteen years and continued to smoke about half a pack a day at the time of the hearing. (Tr. 30-31).

[4] At the hearing, Employer withdrew the issues of timeliness, miner, post 1969 employment, length of employment (stipulated to nineteen years and nine months), dependency, responsible operator, insurance, and issues listed at 18(A) and (B). This was done off the record at the hearing, but is evidenced by the attorney's signatures on my personal copy of DX 49. I now admit this document into the record as ALJX 2.

[5] Claimant testified that as a laborer, he mostly worked with the help well operators, but also helped lay pipe, helped the welder, and worked on the rigs. (Tr. 24).

Procedural History

Claimant filed his initial claim for benefits under the Act on June 8, 1997, and that claim was denied by a Department of Labor claims examiner on September 24, 1999 for failure to establish being totally disabled. (DX 1). No further action was taken on this claim.

On October 16, 2002 Claimant filed a subsequent claim for benefits under the Act. (DX 3). The Director, Office of Worker's Compensation Programs ("OWCP"), issued a proposed decision and order denial of benefits on October 27, 2003. (DX 27). Claimant requested modification of the denial on March 18, 2004. (DX 29). The District Director issued a proposed decision and order denying request for modification on June 4, 2004. (DX 34). Claimant then made another request for modification on August 19, 2004. (DX 35). The District Director issued a proposed decision and order granting request for modification and awarded benefits on January 28, 2005. (DX 41). Employer timely requested a formal hearing before the Office of Administrative Law Judges and this case was transferred to this office on May 12, 2005. (DX 49).

Length of Coal Mine Employment

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence.

In this case, the Employer has stipulated that Claimant worked nineteen years and nine months. (ALJX 2). I find this stipulation is supported by the evidence of record. (DX 1, 7; Tr. 20). Therefore, I find Claimant has established nineteen years and nine months of coal mine employment.

Claimant's last coal mine employment was in the state of Kentucky; therefore, the law of the Sixth Circuit is controlling.[6]

## MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. In a request for modification, the claimant and responsible operator are entitled to submit, in support of their cases, no more than one chest x-ray interpretation, the results of no more than one pulmonary function test, the results of no more than one blood gas study, no more than one report of each biopsy, and no more than one medical report. §§ 725.310 and 725.414(a)(2)(ii) and (a)(3)(ii). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(ii) and (3)(ii) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in

[6] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

At the hearing, Employer attempted to modify its modified summary evidence form. However, after putting all the pieces together, I determined that Employer exceeded the evidentiary limitations set forth at § 725.414. As such, I issued an order on February 27, 2007 requiring both parties to resubmit evidence summary forms to indicate what evidence they wish to be considered in this claim. Both Claimant and Employer complied with this order, and only their most recent evidence summary form shall be considered.

Claimant selected Dr. Hussain to provide his Department of Labor sponsored complete pulmonary examination. (DX 11). Dr. Hussain conducted the examination on December 18, 2002. (DX 12). I admit Dr. Hussain's report under § 725.406(b). I also admit Dr. Burnett's quality-only interpretation of the December 18, 2002 chest x-ray under § 725.406(c). (DX 13).

Claimant completed a Black Lung Benefits Act Evidence Summary Form and submitted it to this office on March 9, 2007.[7] Claimant designated Dr. Hussain's December 18, 2002 x-ray, PFT, ABG, and medical report as OWCP evidence. Claimant designated Dr. Forehand's December 4, 2003 x-ray as initial evidence (DX 28), and Dr. Alexander's reading of the May 8, 2004 x-ray as rebuttal evidence. (CX 2). Claimant also designated Dr. Forehand's December 4, 2003 ABG study as initial evidence, and Dr. Forehand's rebuttal report dated June 23, 2006 of Dr. Dahhan's May 8, 2004 ABG study. Finally, Claimant submitted Dr. Forehand's medical report dated January 9, 2004 as initial evidence. Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(2) and (3). Therefore, I admit the evidence Claimant designated in his summary form.

Employer completed a second Black Lung Benefits Act Evidence Summary Form and submitted it on March 7, 2007.[8] Employer designated as initial evidence: Dr. Dahhan's reading of the May 8, 2004 x-ray.[9] Employer also seeks to introduce Dr. Wiot's x-ray dated January 8, 2003 as "rebuttal evidence" under §§ 725.414(a)(2)(ii) and (3)(ii). However, a rebuttal report must be of the same x-ray study submitted by the Claimant as initial evidence. The x-ray reviewed by Dr. Wiot dated January 8, 2003 was not submitted by the Claimant as initial evidence in this proceeding. As such, it shall not be considered.[10] Dr. Dahhan's reading of the May 8, 2004 x-ray is admitted as initial evidence.

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[7] I now admit this summary form into evidence as CX 5.

[8] I now admit this summary form into evidence as EX 7a.

[9] I note that Employer mistakenly refers to Dr. Dahhan's x-ray study as dated May 12, 2004. EX 1 indicates the film was taken on May 8, 2004.

[10] Employer may wish to argue that this x-ray was submitted as initial evidence in the claim decided on October 27, 2003. (DX 27). However, Employer has had ample time in previous proceedings to rebut the readings contained in

Employer designated Dr. Dahhan's PFT and ABG dated May 8, 2004 as initial evidence. (EX 7a). These studies are admitted as initial evidence.[11]

Employer designated Dr. Dahhan's May 8, 2004 medical report as initial evidence. (EX 7a). Accompanied with the report is Dr. Dahhan's deposition dated June 4, 2004. (EX 2). Dr. Dahhan's medical report complies with § 725.310 and the deposition complies with § 725.414(c). As such, they both shall be admitted as initial evidence.

Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(2) and (3). Therefore, I admit the evidence Employer designated in its summary form.[12]

All the evidence of record relevant to the request for modification and the subsequent claim will be set forth below.

X-RAYS

| Exhibit | Date of X-ray | Date of Reading | Physician / Credentials | Interpretation |
|---|---|---|---|---|
| DX 12 | 12/18/2002 | 12/18/2002 | Dr. Hussain | 2/1tp |
| DX 14 | 12/30/2002 | 12/30/2002 | Dr. Broudy / B-Reader[13] | 0/1ts |
| DX 15 | 01/08/2003 | 01/15/2003 | Dr. Jarboe / B-Reader | 1/0sp |
| DX 28 | 12/04/2003 | 12/04/2003 | Dr. Forehand / B-Reader | 1/2sp |
| EX 1 | 05/08/2004 | 05/08/2004 | Dr. Dahhan / B-Reader | Negative |
| CX 2 | 05/08/2004 | 06/28/2006 | Dr. Alexander /B-Reader BCR[14] | 2/1pt |

this x-ray. A modification proceeding is not an opportunity to re-litigate a case, but exists to determine if a mistake in fact or a change in condition has occurred.

[11] I note that Dr. Dahhan opined that this study showed "inconsistent effort with more than five percent variation and excessive hesitation" and he invalidated the post-bronchodilator portion of the study. (EX 1).

[12] This is with the exception of Dr. Wiot's x-ray as noted above.

[13] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[14] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

PULMONARY FUNCTION TESTS[15]

| Exhibit/ Date | Co-op./ Undst./ Tracings | Age/ Height[16] | $FEV_1$ | FVC | MVV | $FEV_1$/ FVC | Qualifying Results |
|---|---|---|---|---|---|---|---|
| DX 12<br>12/18/2002 | Good/Good/Yes | 59/70 | 2.32<br>2.31* | 3.61<br>3.63* | 72 | 64<br>64* | No<br>No |
| DX 14<br>12/30/2002 | Good/Good/Yes | 59/70 | 2.48<br>2.51* | 3.83<br>3.81* | 58<br>64* | 65<br>66* | No<br>No |
| DX 15<br>1/08/2003 | Good/Good/Yes | 59/69.7 | 2.65<br>2.67* | 4.11<br>4.16* | 70<br>86* | 64<br>64* | No<br>No |
| EX 1 | Fair/Good/Yes | 60/68.1 | 2.31<br>1.86* | 3.39<br>3.16* | 55<br>38* | 68<br>59* | No<br>Yes |

*indicates post-bronchodilator

ARTERIAL BLOOD GAS STUDIES

| Exhibit | Date | $pCO_2$ | $pO_2$ | Qualifying |
|---|---|---|---|---|
| DX 12 | 12/18/2002 | 39.1<br>36.7* | 71.0<br>78.0* | No<br>No |
| DX 14 | 12/30/2002 | 41.7 | 66.8 | No |
| DX 15 | 01/08/2003 | 40.8 | 77.2 | No |
| DX 35 | 12/04/2003 | 39.0<br>33.0* | 58.0<br>50.0* | Yes<br>Yes |

*post-exercise

Narrative Reports

Dr. Hussain examined Claimant on December 18, 2002. (DX 12). Based on symptomatology (rare sputum, wheezing, and cough with mild dyspnea on exertion), a family medical history (high blood pressure and cancer), an individual medical history (frequent colds, attacks of wheezing, arthritis, and allergies), a smoking history of thirty four half-pack years and still smoking, nineteen and a half years of coal mine employment, physical examination, x-ray (2/1), PFT (airway obstruction), ABG (hypoxemia), and an EKG (ST and T wave abnormalities), Dr. Hussain diagnosed pneumoconiosis and COPD. The etiology for both is listed as dust exposure and tobacco smoking, while the impairment is listed as moderate.[17] Dr. Hussain also recommended a referral for further evaluation due to Claimant's abnormal EKG abnormalities.

[15] Dr. Forehand's test does not show compliance with §718.101(b), 718.103 or 718 Appendix B. No curves or tracings, or official results for that matter, are reported. Therefore, it shall not be considered.

[16] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). As the majority of tests found Claimant to be seventy inches tall, I shall use this measurement.

[17] He states that pneumoconiosis is seventy-percent to blame for Claimant's breathing impairment, while smoking is only thirty.

Dr. Bruce Broudy examined Claimant on December 30, 2002. (DX 14). Based on symptomatology (daily cough and sputum since 1993), personal history (wheezing, shortness of breath, and dyspnea on exertion), a physical examination (normal respirations, diminished chest expansion with clear lungs except for coarse rhonchi and wheezes on forced expiration), a smoking history of forty-one pack years, with recently cutting down to half a pack per day,[18] an employment history of twenty years in the coal mines, last working as a roof bolter,[19] x-ray (0/1), PFT (mild obstruction), and ABG (moderate hypoxemia), Dr. Broudy diagnosed mild COPD and chronic bronchitis. As the opacities on the x-ray were irregular, rather than the small rounded opacities which are typical of coal worker's pneumoconiosis, he was able to rule out coal workers' pneumoconiosis. He believed the mild COPD was due to cigarette smoking and Claimant did not suffer from any respiratory disease caused by the inhalation of coal dust. Finally, Dr. Broudy opined that Claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor.

Dr. Thomas Jarboe, who is board certified in internal medicine and pulmonary disease, examined Claimant on January 8, 2003. (DX 15). Based on symptomatology (wheezing, with it worsening at night, daily cough), smoking history (thirty-four half pack years), personal history (no history of asthma; chronic knee pain), physical examination (clear chest with quiet tidal breathing and scattered wheezing on forced expiration; breath sounds were of good intensity), employment history (nineteen and a half years as a coal miner, working as a roof bolter until 1992, when he went to work for a prep plant by cleaning cars, loading cars, and working as an electrician; his last job was as a repairman, which required heavy lifting, welding, and cutting), x-ray (1/0), PFT (mild airflow obstruction with no response to dilators and no evidence of restrictive disease), and an ABG (normal, but carboxy hemoglobin was ten point nine percent, which is compatible with smoking over two packs of cigarettes a day) Dr. Jarboe diagnosed simple coal workers' pneumoconiosis, and the possibility of early emphysema. Nevertheless, Dr. Jarboe opined that Claimant's condition was not totally disabling and stated he retained the functional respiratory capacity to do his last coal mining job or one of similar physical demand in a dust free environment. Dr. Jarboe's deposition merely echoes the findings in his report. (DX 16).

Dr. Randolph Forehand examined Claimant on December 4, 2003. (DX 28). Based on symptomatology (shortness of breath, especially with exertion and at night, sputum production, and wheezing), smoking history (twenty-five half pack years), personal history (arthritis), family history (black lung disease), physical examination (chest walls expand equally with breath sounds heard over all lung fields, but are diffusely diminished; inspirtory crackles are heard throughout with no wheezes), employment history (twenty years in coal mines with the last seven years as a roof bolter, with last job as a preparation plant electrician requiring maintaining, moving, and repairing equipment that weighed up to 800 pounds), x-ray (1/2), PFT (normal), and ABG (abnormal), Dr. Forehand opined that Claimant suffers from pneumoconiosis, and a respiratory impairment of a gas exchange nature (low oxygen), which would prevent Claimant from returning to his last coal mining job without putting his personal safety in jeopardy. Dr. Forehand stated Claimant is totally and permanently disabled from a respiratory standpoint.

[18] This is based on the statement that Claimant began smoking at age eighteen at a pack per day.

[19] It is also noted that Claimant worked with Kentucky West Virginia Gas Company as a laborer in the oil and gas fields from April of 1993 until December of 2000 when he stopped because of knee injuries.

Dr. Dahhan, who is board-certified in both internal and pulmonary medicine, examined Claimant on May 8, 2004. (EX 1). Based on employment history (twenty years coal mine employment, ending in 1992 and last working as a roof bolter; after 1992, worked as a meter reader for a gas company until 2000), smoking history (thirty half-pack years),[20] personal history (daily cough with productive sputum, intermittent wheeze, and dyspnea on exertion), physical examination (good air entry to both lungs with no crepitation, rhonci, or wheeze), x-ray (0/0), PFT (invalid), and ABG (mild hypoxemia), Dr. Dahhan opined that Claimant has mild COPD which is the result of Claimant's smoking habit and not from coal dust exposure. He concluded that Claimant possesses the pulmonary capacity to return to his former coal mine employment or one of comparable physical demand based upon the clinical examination of the chest, PFT, and ABG. Dr. Dahhan's deposition of June 4, 2004 merely restates his medical report. (EX 2).

Smoking History

Claimant's medical records show a history of smoking beginning from anywhere from age eighteen to age thirty. The rate varies, but most of the reports report half a pack a day smoking history. Dr. Hussain reported seventeen pack years (thirty-four half pack years), Dr. Broudy reported forty-one pack years, Dr. Jarboe reported seventeen pack years (thirty-four half pack years), Dr. Forehand reported thirteen pack years (twenty-five half pack years), and Dr. Dahhan reported fifteen pack years (thirty half pack years). As two doctors reported seventeen pack years, I find it to be the most persuasive and conclude Claimant smoked seventeen pack years, and he continues to smoke half a pack a day.[21]

## DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

[20] Claimant reported he began smoking at the age of thirty at the rate of a third to a half pack a day.
[21] This was his status at the hearing. (Tr. 30).

## Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by § 725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Furthermore, the Sixth Circuit Court of Appeals, under whose appellate jurisdiction this case arises, stated that a modification request need not specify any factual error or change in conditions. *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994). Rather, Claimant may merely allege that the ultimate fact, total disability from pneumoconiosis arising out of coal mine employment, was incorrectly decided. *Id.* Additionally, the court stated that the Administrative Law Judge has the duty to reconsider all the evidence for a mistake of fact or a change in conditions. *Id.*

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Benefits Review Board ("Board") similarly stated:

> [T]he Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

*Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *See also Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993). Furthermore, if the newly submitted evidence is sufficient to establish modification . . . the Administrative Law Judge must consider all of the evidence of record to determine whether Claimant has established entitlement to benefits on the merits of the claim. *Kovac v. BNCR Mining Corp.*, 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992).

In the June 4, 2004 decision, the District Director found that Claimant had failed to establish total disability. (DX 34). In accordance with the above precedent, I will review the newly submitted evidence, in conjunction with the evidence that was before the District Director when he considered the subsequent claim, to determine whether such evidence establishes total disability. In addition, the entire record will be reviewed to determine whether a mistake in the determination of a fact occurred in the denial of June 4, 2004.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

**(1)** Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under § 718.202(a)(1), one method for finding that pneumoconiosis exists is the use of x-ray evidence.

In deciding the subsequent claim, the District Director considered the readings of Drs. Hussain, Broudy, Jarboe, and Forehand. (DX 34). My analysis consists of those readings as well as the others listed above by Drs. Dahhan and Alexander that were submitted in connection

with the request for modification. Therefore, in this claim the record contains six interpretations of five x-rays. The x-ray dated December 18, 2002 was read positive by Dr. Hussain. There are no contrary interpretations. Therefore, I find the x-ray dated December 18, 2002 to be positive for pneumoconiosis.

The x-ray dated December 30, 2002 was read negative by Dr. Broudy, who holds B-reader credentials. There are no contrary readings. Therefore, I find the x-ray dated December 30, 2002 to be negative for pneumoconiosis.

The x-ray dated January 8, 2003 was read to be positive by Dr. Jarboe, who holds B-reader credentials. There are no contrary readings present. Therefore, I find the x-ray dated January 8, 2003 to be positive for pneumoconiosis.

The x-ray dated December 4, 2003 was read by Dr. Forehand, who holds B-reader credentials to be positive. There are no contrary readings present. Therefore, I find the x-ray dated December 4, 2003 to be positive for pneumoconiosis.

The x-ray dated May 8, 2004 was read by Dr. Dahhan, who holds B-reader credentials to be negative. Dr. Alexander who is both a B-reader and BCR read the x-ray to be positive. Given Dr. Alexander's superior credentials, I find this x-ray positive for pneumoconiosis.

The record contains four positive readings and one negative reading. Consequently, I find that the x-ray evidence establishes the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a)(1).

**(2)** Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

**(3)** Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

**(4)** The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary

> function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant, medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

The District Director considered Drs. Hussain, Broudy, and Jarboe's reports in issuing the determination regarding the subsequent claim. (DX 27). My analysis also includes these opinions, as well as the opinions of Drs. Forehand and Dahhan. Dr. Hussain diagnosed clinical pneumoconiosis and COPD with an etiology of both smoking and coal dust exposure (legal pneumoconiosis). Dr. Hussain's diagnosis of clinical pneumoconiosis is based upon the x-ray as well as the physical examination. As such, I accord his opinion on this issue probative weight. Regarding his finding of COPD, Dr. Hussain fails to articulate how he can conclude that coal dust exposure is responsible for the condition. As such, I accord his opinion on the issue of legal pneumoconiosis little weight.

Dr. Broudy opined that Claimant suffered from neither clinical nor legal pneumoconiosis. He found that the radiographic evidence did not support a finding of clinical pneumoconiosis, while the mild COPD and chronic bronchitis were the result of cigarette smoking. The conclusion that Claimant does not suffer from pneumoconiosis is supported by the x-ray evidence Dr. Broudy had available to him as well as his physical findings. Therefore, I accord this portion of his opinion probative weight. However, Dr. Broudy failed to articulate how he could conclude the mild COPD and chronic bronchitis were attributable only to cigarette smoking and how nineteen plus years of coal mine employment did not factor in. As such, I accord this portion of his opinion little weight.

Dr. Jarboe diagnosed simple coal workers' pneumoconiosis based upon x-ray evidence as well as his physical examination of the Claimant. He also opined that Claimant shows signs of early emphysema, but did not provide an etiology. As Dr. Jarboe based his diagnosis of clinical pneumoconiosis upon objective evidence, I accord his opinion on this issue probative weight. As he was equivocal on his diagnosis of emphysema and failed to provide an etiology, I accord his opinion on the issue of legal pneumoconiosis little weight.

Dr. Forehand diagnosed coal workers' pneumoconiosis based upon an x-ray as well as his physical examination of the Claimant. As Dr. Forehand relied upon objective evidence and clearly articulated his opinion, I accord his opinion probative weight on this issue. Dr. Forehand also diagnosed a respiratory impairment of a "gas exchange nature" based upon ABG testing that is the result of exposure to coal dust (hence, legal pneumoconiosis). However, Dr. Forehand failed to explain how he could conclude Claimant's gas exchange problem was the result of coal

mine employment, and not cigarette smoking. As such, I find this portion of his opinion unreasoned and accord it little weight.

Dr. Dahhan diagnosed mild COPD resulting from cigarette smoking, and stated that Claimant did not suffer from any coal dust induced lung disease. He based the absence of clinical pneumoconiosis upon a negative x-ray reading. However, this same x-ray was interpreted to be positive by a doctor with superior credentials. Therefore, I accord his diagnosis regarding clinical pneumoconiosis little weight. Dr. Dahhan based his diagnosis of mild COPD attributable to smoking based upon his physical examination and objective testing. However, Dr. Dahhan fails to adequately explain how the mild impairment is the result of smoking and not coal dust exposure. Therefore, I also accord his finding in regard to legal pneumoconiosis little weight.

Here, I find the opinions of Drs. Hussain, Broudy, Jarboe, and Forehand outweigh the opinion of Dr. Dahhan. As such, I find that the medical opinion evidence establishes the existence of pneumoconiosis by a preponderance of the evidence under § 728.202(a)(4).

Upon consideration of all the evidence under § 718.202(a), I find the x-ray evidence in combination with the medical opinion evidence establishes, by a preponderance of the evidence, the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000). As a corollary, I also find no mistake of fact as the Director also found the evidence established the existence of pneumoconiosis.

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established nineteen years and nine months of coal mine employment, and as no rebuttal evidence was presented, and since I found that he suffered from pneumoconiosis, he is entitled to the rebuttable presumption set forth in § 718.203(b) that his pneumoconiosis arose out of his coal mine employment. All of the doctors who found the existence of pneumoconiosis also found that it was the result of coal mine employment. No evidence has been put forth by Employer that would indicate that Claimant's pneumoconiosis is not the result of coal mine employment.[22] Therefore, I find that Claimant's pneumoconiosis arose out of his coal mine employment.

Total Disability

Claimant may demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together,

[22] Dr. Dahhan opined that Claimant's "condition" did not arise from coal mine employment, but he failed to diagnose pneumoconiosis. Therefore, I accord his opinion on this issue no weight.

regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant has established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The record contains four pulmonary function studies, all with post-bronchodilator results. Only one of the eight studies produces qualifying values. As such, I find that a preponderance of the evidence here does not establish total disability under § 718.204(b)(2)(i). Therefore, I find that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(i) and that no mistake of fact was made by the District Director when he made the same finding.

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. The record contains four ABG studies with only one producing qualifying values. All of the ABG testing was done within one calendar year. I therefore find that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(ii) and that no mistake of fact was made by the District Director when he made the same finding.

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment.

Claimant's usual coal mine employment as a roof bolter required him to lift heavy pieces of metal when they did not have the equipment to get them in place, lifting pipe, and crawling in and out of chutes, and belt lines. (Tr. 20). As a laborer for with Kentucky West Virginia Gas he helped lay pipe and helped the welder. This required laying pipe and holding it in place. (Tr. 24-25).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and

the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Hussain opined that Claimant suffered from a moderate pulmonary impairment, while Drs. Broudy, Jarboe, and Dahhan found Claimant was not totally disabled and Dr. Forehand opined Claimant was totally disabled from a pulmonary standpoint.

Dr. Hussain based his finding of a moderate pulmonary impairment based upon PFT testing as well as his physical examination. However, he failed to opine as to whether Claimant possessed the pulmonary capacity to return to his former coal mine employment. As such, I accord his opinion on this issue only some weight.

Dr. Broudy's opinion is based upon the PFT and ABG testing as well as his physical examination. Even though he reads the x-ray as negative for pneumoconiosis, his assessment of Claimant's pulmonary capacity is based upon objective evidence as well as his physical examination. Dr. Broudy also articulates a correct employment history. As such, I accord his opinion on the issue of total disability probative weight.

Dr. Jarboe opines that Claimant's pneumoconiosis is not totally disabling based upon the PFT, ABG, and physical examination. As Dr. Jarboe relies upon objective evidence, articulated an accurate employment history, I find his opinion to be both well reasoned and well documented and accord it probative weight.

Dr. Dahhan finds based upon PFT and ABG testing as well as his physical examination, that Claimant is not totally disabled from a pulmonary standpoint, but only suffers from a mild form of COPD. As Dr. Dahhan relies upon objective evidence as well as his physical examination, I find his opinion well reasoned and accord it probative weight.

Dr. Forehand opines that Claimant is totally disabled from a pulmonary standpoint based upon a "blood gas exchange" problem, as shown on the ABG testing he considered, and based upon his physical examination. Even though Dr. Forehand does not consider the other ABGs of record, the one he relies upon supports the opinion he put forth. As such, I find his opinion to be well reasoned and accord it probative weight.

Here, I have three medical opinions by Drs. Broudy, Jarboe, and Dahhan which state Claimant is not totally disabled, one by Dr. Forehand which opines he is totally disabled, and one by Dr. Hussain which states Claimant suffers from a moderate pulmonary impairment. I find the opinions of Drs. Broudy, Jarboe, and Dahhan the most persuasive on the issue of total disability. I do not believe a moderate pulmonary impairment would prevent Claimant from returning to his

former coal mine employment or his employment with Kentucky West Virginia Gas, which ended due to a knee injury. (Tr. 33).

Thus, I find that the medical narrative evidence does not support a finding of total pulmonary disability under § 718.204(b)(iv). I also find the Director made no mistake of fact on this issue.

In weighing all the evidence for or against total disability under subsection (b)(i)(iv), I find that Claimant has failed to establish, by a preponderance of the evidence, that he has a totally disabling pulmonary impairment. As a corollary, he has not established a change in condition or a mistake in a determination of fact since the denial of his subsequent claim.

Entitlement

While L.C. has established the existence of pneumoconiosis, he has not established that he is totally disabled from a pulmonary standpoint, and, thus, has failed to establish either a change in condition or a mistake of fact. Therefore, I find that L.C. is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

## ORDER

IT IS ORDERED that the claim of L.C. for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

## NOTICE OF APPEAL RIGHTS

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).